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No. 82-827

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the Fifth Amendment to the United States Constitution require, in the absence of a *Miranda*-type warning, suppression of a probationer's noncustodial but incriminating admissions to his probation officer where the probationer is required by the conditions of his probation to meet with his probation officer as directed and to be truthful with her and the probation officer has reason to believe that the probationer's answers to her questions are likely to be incriminating?

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MARSHALL DONALD MURPHY,

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (App. A) is reported at 324 N.W.2d 340 (Minn. 1982). The opinion of the Hennepin County District Court (App. B) is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court (App. 14-15) was entered on September 21, 1982. The petition for a writ of certiorari was filed on November 9, 1982. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> ". . . Nor shall any state deprive any person of life, liberty, or property, without due process of law."

Section 609.14 of the Minnesota Statutes of 1980:

> "Subdivision 1. When it appears that the defendant has violated any of the conditions of his probation or has otherwise been guilty of misconduct which warrants the imposing (sic) or execution of sentence, the court may without notice revoke the stay thereof and probation and direct that the defendant be taken into immediate custody.
>
> Subd. 2. The defendant shall thereupon be notified in writing and in such manner as the court directs of the grounds alleged to exist for revocation of the stay of imposition or execution of sentence. If such grounds are brought in issue by the defendant, a summary hearing shall be held thereon at which he is entitled to be heard and to be represented by counsel.
>
> Subd. 3. If any such grounds are found to exist the court may:
>
> (1) If imposition of sentence was previously stayed, again stay sentence or impose sentence and stay the execution thereof, and in either event place the defendant on probation pursuant to section 609.135, or impose sentence and order execution thereof; or

(2) If sentence was previously imposed and execution thereof stayed, continue such stay and place the defendant on probation in accordance with the provisions of section 609.135, or order execution of the sentence previously imposed.

Subd. 4. If none of such grounds are (sic) found to exist, the defendant shall be restored to his liberty under the previous order of the court."

STATEMENT OF THE CASE

On the morning of September 28, 1981, during the course of a meeting with his probation officer, Marshall Donald Murphy (hereinafter "respondent") confessed to the rape and murder of a seventeen-year-old woman. In a pretrial certified appeal of the Hennepin County District Court's order ruling the confession admissible, the Minnesota Supreme Court held, solely on federal constitutional grounds, that the confession could not be used in the State's prosecution of respondent for murder in the first degree (App. A-10). The circumstances leading to respondent's confession were as follows:

On August 19, 1980, respondent pled guilty to the crime of false imprisonment (Minn. Stat. § 609.255 (1980)) in a prosecution for criminal sexual conduct in the second degree (Minn. Stat. § 609.343 (1980)).[1] Following this plea, the Hennepin County District Court sentenced respondent to a stayed prison term of sixteen months and a probation term of three years (App. C-31). The conditions of respondent's probation required him, *inter alia*, to participate in a treatment program for sexual offenders, to report to his

[1]Respondent was originally charged with criminal sexual conduct in the second degree. He pled guilty to false imprisonment, a lesser included offense, pursuant to the terms of a plea negotiation agreement.

probation officer as directed, and to be truthful with her in all matters (App. C-32). The terms of respondent's probation also provided that failure to comply with these conditions "[could] cause [respondent] to be returned to the Court for further hearing or commitment" (App. C-33). On September 22, 1980, the District Court appointed Mara Widseth (hereinafter "Widseth"), a probation officer with the Hennepin County Department of Court Services, to supervise respondent's probation.

Respondent is a twenty-nine-year-old high school graduate (App. C-25, C-29) who attended vocational school and later served in the military (App. C-29). By virtue of previous criminal convictions, he was familiar with the criminal justice system at the time of the confession which is at issue herein (App. C-29). Following his sentencing on the false imprisonment conviction, respondent participated in a treatment program for sexual offenders and met with his probation officer once a month to discuss treatment, employment, and personal relationships (App. C-5-6). The monthly meetings took place in Widseth's office (App. C-6) and were scheduled by respondent at his convenience (App. C-5). Between September 1980 and September 1981, respondent and Widseth met in her office approximately twelve times (App. C-6).

On July 14, 1981, upon learning that respondent was no longer in treatment, Widseth wrote respondent a letter asking him to contact her immediately (App. C-7). Widseth stated that respondent's failure to contact her would result in an immediate request for a warrant (App. C-35). Respondent contacted Widseth by telephone and agreed to meet with her in her office on July 21, 1981 (App. C-8).

During the course of this meeting, respondent told Wid-

seth that he did not want to continue treatment (App. C-14). Widseth acquiesced and told respondent that she would not seek to have his probation revoked on that ground alone because he was employed and seemed to be doing well in other areas (App. C-14). Respondent and Widseth met again in her office on September 11, 1981, without incident (App. C-8, C-14).

On September 22, 1981, Widseth learned from a counselor in respondent's treatment program that during the course of treatment respondent had admitted the commission of a rape and murder in 1974 and had indicated that he was not arrested because of the lack of evidence (App. C-15). After discussing the matter with her supervisor, Widseth decided that she would have to relay the information she had received from respondent's counselor to the police (App. C-16). She then wrote respondent a letter asking him to contact her in order to discuss a treatment plan for the remainder of his probation (App. C-15). The letter contained no threats or promises (App. C-36).

Upon receiving Widseth's letter, respondent contacted her by phone and made an appointment to meet with her in her office on September 28, 1981. Prior to this meeting, neither Widseth nor her supervisor had contacted, or been contacted by, law enforcement authorities concerning the rape and murder to which respondent later confessed (App. C-20).

Widseth began the September 28 meeting by telling respondent the substance of the information she had received from his counselor (App. C-16). She then proceeded to stress the need for further treatment in light of the behavioral relationship between the incident leading to respondent's false imprisonment conviction and the rape and mur-

der to which respondent had confessed during treatment (App. C-9). Upon learning that his counselor had disclosed confidential information to his probation officer, respondent became angry (App. C-9) and stated that "he felt like calling a lawyer" (App. C-21, C-26). Widseth told respondent that "he would have to deal with [that] outside the office" (App. C-16). She then reiterated the need to discuss the behavioral relationship between the incidents leading to the false imprisonment conviction and the 1974 rape and murder, stating that such relationship indicated the need for further treatment (App. C-16).

Respondent denied committing the crime of false imprisonment and stated that at the time of the rape and murder he had been using drugs quite heavily (App. C-9). He also stated that he was no longer using drugs (App. C-9). Widseth "confronted" respondent with his claim of innocence of the false imprisonment charge by reviewing with him a police report and a presentence investigation regarding the offense, as well as specific incidents reported by the victim and respondent's own statements concerning the crime (App. C-17-18). Without prodding by Widseth, respondent then proceeded to talk about the 1974 rape and murder in detail (App. C-18).

At the conclusion of the meeting, Widseth told respondent that she had a duty to relay the information he had given her to the police and encouraged him to turn himself in (App. C-18, C-28). Respondent said he understood that Widseth was obligated to go to the police but noted that unless he confessed to the police "it would just be [Widseth's] word [against his]" (App. C-22). He then asked Widseth for time to think about whether or not to turn himself in (App. C-18). Widseth acquiesced (App. C-18).

Respondent began crying and told Widseth that he had committed the "ultimate sin" (App. C-11). He also told Widseth that she "must really care about him" because she gave him time to think instead of turning him in to the police right away (App. C-18-19, C-21). Respondent took a few minutes to compose himself and left the office (App. C-19).

Throughout the entire course of this meeting the door to Widseth's office was unlocked and respondent was free to leave at any time (App. C-19-20).

On September 30, 1981, respondent called Widseth and told her that he had consulted an attorney and had been advised not to turn himself in (App. C-28). On October 2, 1981, Widseth procured the issuance of an arrest and detention warrant against respondent "for failure . . . actively [to] work on a problem area and to comply with the terms of [treatment]" (App. C-14-15). On October 29, 1981, the Hennepin County Grand Jury returned an indictment charging respondent with murder in the first degree (Minn. Stat. § 609.185(2) (1974)).

At a pretrial hearing held before the Hennepin County District Court respondent moved to suppress his confession on the ground that it was obtained in violation of his Fifth and Fourteenth Amendment rights. The trial court ruled that the confession was admissible against respondent in a prosecution for murder in the first degree despite the probation officer's failure to advise him of his Fifth Amendment rights. The court reasoned that respondent was not constitutionally entitled to warnings at the time of questioning because he was neither "in custody" nor "otherwise deprived of his freedom of action in any significant way" (App. B-11-12). The court further reasoned that respon-

dent's statements were neither "compelled" in the manner proscribed by the Fifth Amendment nor "involuntary" within the meaning of the Due Process Clause (App. B-13-14). In addition, the trial court found that respondent's reference to an attorney was made in the context of a civil suit for breach of confidentiality against the counselor who had disclosed confidential information to his probation officer and did not, therefore, constitute an assertion of respondent's privilege against self-incrimination (App. B-13-14).

On appeal the Minnesota Supreme Court reversed the order of the trial court and remanded the matter for further proceedings, holding as follows:

> Because of the compulsory nature of the meeting, because [respondent] was under court order to respond truthfully to his [probation officer's] questions, and because the [probation officer] had substantial reason to believe that [respondent's] answers were likely to be incriminating we conclude that, as a matter of federal constitutional law, any failure on [respondent's] part to claim the [Fifth Amendment] privilege [against compelled self-incrimination] when he was questioned does not bar his later reliance on the privilege in seeking supression of his confession. Stated differently, we conclude that as a matter of due process, the [probation officer] should have warned [respondent] of his privilege against compelled self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of [respondent's] confession at his trial."

324 N.W.2d at 344 (Minn. 1982). Following the judgment of the Minnesota Supreme Court suppressing respondent's

confession, the Hennepin County District Court dismissed respondent's indictment and stayed the dismissal pending appeal to this Court (App. D-3-4).

SUMMARY OF ARGUMENT

The question presented herein is whether a probationer who makes incriminating admissions to his probation officer during the course of a noncustodial interview in lieu of invoking his Fifth Amendment privilege against compelled self-incrimination may subsequently invoke the privilege to bar use of his incriminating admissions in a criminal prosecution for murder in the first degree.

In holding that a probationer who is not in custody may so invoke the privilege, the Minnesota Supreme Court has in effect ruled that probationers are constitutionally entitled to be warned of their Fifth Amendment privilege prior to a noncustodial interview with their probation officers and that failure on the part of the probation officers so to warn precludes use of the probationer's voluntary but incriminating admissions in a subsequent criminal prosecution. Thus, the decision of the Minnesota Supreme Court departs significantly from the leading decisions of this Court defining the scope of the government's obligation under the Fifth Amendment.[3]

The Minnesota Supreme Court's holding is premised on two critical misconceptions which compel reversal: First, that a probationer's noncustodial interview with his probation officer, like police custodial interrogation, contains inherently coercive pressures which work to undermine the

[3] *United States v. Washington*, 431 U.S. 181 (1977); *Garner v. United States*, 424 U.S. 648 (1976); *Beckwith v. United States*, 425 U.S. 341 (1976); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966).

probationer's will to resist and his ability to make a free and rational choice; and, second, that the conditions of probation and the probation officer's belief that the probationer's answers to her questions are likely to be incriminating, without more, deprive probationers of the "free choice to admit, to deny, or to refuse to answer." *Garner v. United States*, 424 U.S. 648, 657 (1976) (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)).

For reasons more fully set forth below, petitioner submits that the constitution does not require that a probationer be given any warnings, least of all full *Miranda* warnings, prior to a noncustodial interview with his probation officer. Further, petitioner submits that a probationer who makes incriminating admissions to his probation officer during the course of a noncustodial interview instead of claiming his Fifth Amendment privilege is precluded from subsequently invoking the privilege as a bar to the use of his incriminating admissions in a criminal prosecution.

1. A probation officer's failure to advise a probationer who is not in custody of his privilege against self-incrimination does not impermissibly compel the probationer's incriminating admissions in violation of the Fifth Amendment. The Self-Incrimination Clause of the Fifth Amendment provides only that a person shall not be *compelled* to give evidence against himself. In the absence of compulsion, therefore, the Self-Incrimination Clause proscribes neither self-incrimination, nor the questioning of a person suspected of a crime, nor the use in evidence of voluntary admissions made by a person suspected of a crime. Thus, the fatal flaw in the Minnesota Supreme Court's application of a warnings requirement to probationers who are not in custody lies in the court's failure to recognize that the privi-

lege against self-incrimination comes into play only when there is compulsion of testimony.

Moreover, this Court has carefully limited the requirement that interrogation be preceded by a full recitation of rights to the process of incommunicado custodial police interrogation. The salient features of incommunicado police interrogation, however, differ markedly in their potential for overbearing the will of an individual from the characteristics of a probationer's noncustodial interview with his probation officer. The latter takes place in familiar surroundings at a time when the probationer is neither under formal arrest nor deprived of his freedom of action in any significant way. The inherent pressures upon a person taken into custody and the opportunities for the use of physical force, threats, or intimidation to overcome the probationer's will to resist are thus nonexistent in the probationary setting. Therefore, to extend the requirement of warnings in the context of in-custody interrogation to noncustodial questioning by a probation officer would be an "extravagant expansion never remotely contemplated by this Court in *Miranda*[.]" *United States v. Mandujano*, 425 U.S. 564, 580 (1976). Indeed, the Court explicitly rejected such an extension in *Miranda* by stating that police "inquiry of persons not under restraint" or "other general questioning of citizens in the fact-finding process is not affected by [this] holding." *Miranda v. Arizona, supra*, 384 U.S. at 477.

Furthermore, if noncustodial questioning of a probationer by his probation officer is to be equated with incommunicado police custodial interrogation, as the Minnesota Supreme Court implicitly has done, it is difficult to see why such questioning is more coercive when the probation officer suspects the probationer of criminal activity than it is

otherwise. Indeed, the holding of the Court in *Beckwith v. United States*, 425 U.S. 341 (1976), established beyond any doubt that whether a person has been compelled within the meaning of the Fifth Amendment has nothing to do with "the strength or content of the government's suspicions at the time the questioning was conducted." 425 U.S. at 346 (quoting *United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970)). Rather, the presence or absence of impermissible compulsion turns upon the question whether, in the circumstances, it is likely that an individual's free will was overborne. *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

A warnings requirement such as that imposed by the Minnesota Supreme Court, hinging on the suspicions of the probation officer at the time of questioning, fails to recognize *Miranda's* concern with the coercive effect of custodial interrogation from the point of view of the person being questioned. *See United States v. Hall*, 421 F.2d 540, 544 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970). Moreover, it rests upon the self-contradictory thesis that noncustodial questioning by a probation officer is constitutionally coercive only of some probationers, who can be identified and distinguished from other probationers solely on the basis of factors having nothing to do with coercion. Fifth Amendment warnings, therefore, should not be required to precede noncustodial questioning of a probationer simply because the probation officer has reason to believe that the probationer's answers to her questions are likely to result in incriminating admissions. *See United States v. Washington*, 431 U.S. 181, 189 (1977); *United States v. Mandujano, supra*, 425 U.S. at 574.

2. A probationer who makes incriminating admissions

to his probation officer instead of claiming his Fifth Amendment privilege against compulsory self-incrimination may not subsequently invoke the privilege as a bar to the use of his incriminating admissions in a criminal prosecution. A probationer's noncustodial interview with his probation officer is analogous to the giving of testimony in a civil proceeding, before a grand jury, or in response to an administrative summons. It is clear that when such testimony is given without a contemporaneous claim of privilege, it has not been "compelled" in the manner proscribed by the Fifth Amendment and it may therefore be used against the witness in a subsequent criminal prosecution. *See United States v. Kordel*, 397 U.S. 1, 10 (1970); *United States v. Monia*, 317 U.S. 424, 427 (1943); *United States v. Murdock*, 284 U.S. 141, 148 (1931).

A probationer who is required to meet with his probation officer as directed and to be truthful with her is subject to no greater compulsion during the course of a noncustodial interview with his probation officer than that experienced by a grand jury witness or a witness in an ordinary civil proceeding. Most importantly, a probationer may not constitutionally be punished for invoking his Fifth Amendment privilege against self-incrimination in lieu of answering questions which, if answered truthfully, would result in incriminating admissions. *See Spevack v. Klein*, 385 U.S. 511, 515 (1967), *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Thus, a valid claim of privilege would be available to a probationer as a complete defense to probation revocation. The protection accorded a probationer's claim of privilege at a revocation hearing is sufficient under *Garner* to preserve the probationer's "free choice to admit, to deny, or to refuse to answer." *Garner v. United States*,

supra, 424 U.S. at 657 (quoting *Lisenba v. California*, *supra*, 314 U.S. at 241).

Thus, probationers who are not in custody are not subjected to any undue pressures designed to coerce them to forego a valid claim of privilege simply by virtue of their probationary status. Therefore, since the Fifth Amendment confers an immunity from prosecutorial use only upon disclosures made as a result of testimonial compulsion, no constitutional basis exists for barring prosecutorial use of a probationer's non-custodial admissions to his probation officer absent a timely claim of privilege.

3. The Due Process Clause of the Fourteenth Amendment requires neither the routine administration of warnings in the probationary setting nor the suppression of respondent's incriminating admissions to his probation officer. The critical inquiry under the Due Process Clause is whether "the behavior of law enforcement officials was such as to overbear [an individual's] will to resist and bring about confessions not freely self-determined." *Rogers v. Richmond*, *supra*, 365 U.S. at 544. In making this determination, the Court has assessed the "totality of all the surrounding circumstances" in a particular case, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), and has considered a variety of criteria including the use of physical force, *Brown v. Mississippi*, 297 U.S. 278 (1936); the use of deceptive promises and practices, *Spano v. New York*, 360 U.S. 315 (1959); the use of threats, *Lynumn v. State of Illinois*, 372 U.S. 528 (1963); the length of detention, *Chambers v. Florida*, 309 U.S. 227 (1940); and the prolonged nature of the interrogation, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). Although the administration of warnings of constitutional rights is a relevant criterion in assessing

the voluntariness of an individual's incriminating disclosures, it is not, in and of itself, determinative. *See Schneckloth v. Bustamonte, supra,* 412 U.S. at 227. A determination of voluntariness turns, not on the presence or absence of a single controlling criterion, but on a careful scrutiny of all the surrounding circumstances. *Id.*

A careful scrutiny of the circumstances surrounding respondent's incriminating admissions to his probation officer reveals that respondent's admissions were the product of his free and rational choice. None of the traditional indicia of involuntariness is present in this case. Respondent is a twenty-nine-year-old high school graduate who, by virtue of prior criminal convictions, was thoroughly familiar with the criminal justice system at the time of his incriminating admissions. He was interviewed in surroundings that had been familiar to him for at least twelve months and was subjected to no menacing interrogation procedures, overbearing tactics of psychological persuasion, physical coercion, lengthy incommunicado detention, threats or promises. Indeed, the interview was conducted with a high degree of civility and restraint. Moreover, respondent was neither under formal arrest nor deprived of his freedom of action in any way. Rather, he was free to leave at any time and was in fact allowed to leave at the conclusion of the interview even though he had confessed to the rape and murder of a seventeen-year-old woman. In these circumstances the probation officer's failure to advise respondent of his Fifth Amendment rights can hardly be said to have been unfair, let alone to have violated "fundamental fairness" or to be "shocking to the universal sense of justice." *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 246 (1960).

In finding respondent's confession to have been obtained in violation of due process, the Minnesota Supreme Court disregarded the traditional criteria of involuntariness and relied instead on factors which do not even approximate the circumstances this Court has recognized as rendering confessions involuntary. Thus, because under the standards developed by this Court there is no basis for concluding that respondent's incriminating admissions were obtained in violation of due process, such admissions may properly be used in the State's prosecution of respondent for murder in the first degree.

ARGUMENT

I.

A PROBATION OFFICER'S FAILURE TO ADVISE A PROBATIONER OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION PRIOR TO A NONCUSTODIAL INTERVIEW DOES NOT IMPERMISSIBLY COMPEL THE PROBATIONER'S INCRIMINATING ADMISSIONS IN VIOLATION OF THE FIFTH AMENDMENT

The principal issue in this case is whether incriminating admissions made by respondent to his probation officer during the course of a noncustodial interview are rendered inadmissible by the probation officer's failure to advise respondent of his Fifth Amendment privilege against compelled self-incrimination. In considering this issue, the trial court ruled that respondent's incriminating disclosures were admissible in evidence despite the probation officer's failure to advise him of his rights. The trial court reasoned that respondent was not constitutionally entitled to Fifth

Amendment warnings at the time of questioning because he was neither "in custody" nor "otherwise deprived of his freedom of action in any significant way" (App. B-11-12). The court further reasoned that respondent's admissions were neither "compelled" in the manner proscribed by the Fifth Amendment nor "involuntary" within the meaning of the Due Process Clause (App. B-12-14).

On appeal, the Minnesota Supreme Court reversed the ruling of the trial court, holding that the probation officer's failure to advise respondent of his Fifth Amendment rights barred use of his incriminating disclosures at trial and, further, that respondent's failure to make a timely claim of privilege did not preclude him from subsequently invoking the privilege as a bar to the use of his admissions at trial. While the Minnesota Supreme Court did not expressly articulate the chain of reasoning leading to its decision or the constitutional basis upon which its holding rests, it appears that the court based its holding both on the Self-Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. Further, it appears that the court's decision rests, to some extent, on the perception that it is somehow unfair to require a probationer to meet with his probation officer and to be truthful with her when the probation officer has reason to believe that the probationer's answers to her questions are likely to result in incriminating admissions. The remedy prescribed by the Minnesota Supreme Court for this perceived impropriety is the giving of Fifth Amendment warnings.

Petitioner submits that the routine administration of Fifth Amendment warnings prior to a probation officer's noncustodial interview of a probationer is neither constitu-

tionally required nor desirable from the standpoint of the policies enunciated by this Court regarding the function of probation. *See, e.g., Gagnon v. Scarpelli,* 411 U.S. 778, 783 (1973); *Morrisey v. Brewer,* 408 U.S. 471, 477 (1972). The administration of warnings is simply a "prophylactic standard" designed to safeguard the privilege against self-incrimination in settings such as incommunicado custodial interrogation where it is deemed to be singularly threatened. *Michigan v. Tucker,* 417 U.S. 433, 446 (1974). As such, the routine administration of warnings has no place in the probationary setting.

A. THE REQUIREMENT THAT ANY WARNING OF RIGHTS BE GIVEN APPLIES ONLY TO CUSTODIAL INTERROGATION

The Self-Incrimination Clause of the Fifth Amendment speaks of compulsion. In *Michigan v. Tucker, supra,* 417 U.S. at 448, this Court reaffirmed the principle that "[c]ases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself." (Emphasis in original.) As a general rule, the question of coercion is one of fact. Thus, prior to *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court would review a claim that law enforcement officials coerced incriminating statements from a person in custody by examining the particular circumstances of the interrogation in order to determine whether the process was so coercive as to render involuntary any statement made during the course of questioning.[3] In *Miranda,* how-

[3] *See, e.g., Haynes v. Washington,* 373 U.S. 503 (1963); *Payne v. Arkansas,* 356 U.S. 560 (1958); *White v. Texas,* 310 U.S. 530 (1940); *Chambers v. Florida,* 309 U.S. 227 (1940); *Brown v. Mississippi,* 297 U.S. 278 (1936).

ever, the Court announced a prophylactic rule that did not depend upon a finding of actual involuntariness. Under this rule, police officers are required to give adequate warnings of the constitutional right to remain silent and to consult with a lawyer prior to any custodial questioning of a criminal suspect. Absent such warnings, statements made in response to custodial questioning are inadmissible at a subsequent criminal trial.

The *Miranda* Court predicated its holding upon the conclusion that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. The Court based its conclusion upon an examination of police practices that were then widely in use. It noted that under these practices a suspect "was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures" designed "to subjugate the individual to the will of his examiner." 384 U.S. at 457. Referring to various police manuals and texts that set forth suggested interrogation techniques, the Court further noted that "the modern practice of in-custody interrogation is psychologically rather than physically oriented." 384 U.S. at 448. The Court stressed that custodial interrogation is based, not on physical brutality, but on "relentless questioning" in an oppressive police-dominated atmosphere and on "deceptive strategems" designed to undermine the will of the subject to resist. 384 U.S. at 455. It concluded that, under these circumstances, "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." 384 U.S. at 455.

In *Miranda*, the Court defined the term "custodial interrogation" clearly and unambiguously to mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Although the Court has subsequently indicated that "custodial interrogations" may occur outside of a police station, *see Orozco v. Texas*, 394 U.S. 324, 327 (1969), it has also clearly established that warnings are required only when the person being interrogated is under formal arrest or otherwise deprived of his freedom in any significant way. *See Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *Orozco v. Texas, supra; Mathis v. United States*, 391 U.S. 1, 4-5 (1968).

None of the considerations that led the Court in *Miranda* to require warnings of constitutional rights prior to custodial interrogation requires the imposition of a similar requirement in the probationary setting. As the facts of this case demonstrate, the typical interview of a probationer by his probation officer is not held under "custodial conditions." Therefore, the administration of warnings designed to safeguard the privilege against self-incrimination during custodial police interrogation is not justified in the probationary setting.

Here, respondent was neither under formal arrest nor deprived of his freedom of action in any way. Throughout the course of the entire interview the door to his probation officer's office was unlocked and respondent was free to leave at any time. He was in fact allowed to leave at the conclusion of the interview even though he had confessed to the rape and murder of a seventeen-year-old woman. "Such a noncustodial situation is not converted to one in

which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' " *Oregon v. Mathiason, supra,* 429 U.S. at 495.

Similarly, respondent's belief that he was not free to leave does not establish the atmosphere of coercion which the *Miranda* Court found to be typical of custodial situations and does not, therefore, render respondent "in custody." As Judge Friendly observed in *United States v. Hall,* 421 F.2d 540, 544 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970), "[t]he [*Miranda*] Court could scarcely have intended the issue whether [a] person being interrogated ha[s] 'been taken into custody or otherwise deprived of his liberty in any significant way' to be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect . . . and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them. Moreover, any formulation making the need for *Miranda* warnings depend upon how each individual being questioned perceives his situation would require a prescience neither the police nor anyone else possesses * * * The test [for determining custody] must thus be an objective one."

B. A PROBATION OFFICER'S NONCUSTODIAL INTERVIEW OF A PROBATIONER IS NOT SO INHERENTLY COERCIVE AS TO REQUIRE THE GIVING OF WARNINGS APPROPRIATE TO CUSTODIAL INTERROGATION

In the absence of a custodial situation, the routine administration of Fifth Amendment warnings in the probationary setting would be appropriate only if the manner in which a probation officer's interview of a probationer is typically conducted entails a high degree of coercion, as was found to be the case with incommunicado police interrogation in *Miranda*. The police interrogation environment that formed the basis for the presumption of coercion in *Miranda*, however, contrasts sharply with the nature of a probationer's noncustodial interview with his probation officer. "*Miranda* addressed extra-judicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards." *United States v. Mandujano*, 425 U.S. 564, 579 (1976). There is nothing in the typical interview of a probationer, or in the particular interview in this case, that even approximates the environment which formed the basis of the Court's holding in *Miranda*.

By contrast to the unfamiliar setting in which police interrogation occurs, respondent's interview with his probation officer took place in surroundings that had been familiar to him for at least twelve months. The interview was brief and was held at a time of respondent's choice following an appointment made by him in advance. Moreover, unlike the relentless incommunicado questioning recommended by the police manuals in *Miranda*, respondent's meeting with his probation officer was conducted in a con-

genial manner which brought respondent to tears (App. C-11) and to the realization that his probation officer "must really care about him" (App. C-19).

The fact that respondent may have been under "heavy psychological pressure" to answer his probation officer's questions (App. A-8) does not establish the atmosphere of coercion upon which *Miranda* rests. Nor does the fact that respondent may have believed that he was obligated to cooperate with his probation officer render his statements involuntary unless the probation officer, by word or deed, caused respondent's misapprehension. The compulsion that renders a noncustodial interview coercive must come from the government agent conducting the interrogation, not from the inner thoughts or feelings of the interrogee. Indeed, if that were not the case, every instance of questioning by a probation officer in which a probationer makes incriminating admissions would be deemed coercive in the absence of warnings.

Similarly, the probation officer's letter requesting respondent to meet with her cannot be said to have placed respondent in "custody" or to have rendered the interview inherently coercive. This letter is analogous to a subpoena to testify before a grand jury or in a civil proceeding. Such subpoenas have generally been held not to place a witness in "custody." *See, e.g., United States v. Binder,* 453 F.2d 805, 809 (2d Cir. 1971), *cert. denied,* 407 U.S. 920 (1972); *Gollaher v. United States,* 419 F.2d 520, 524 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969). The recipient of a subpoena has an opportunity in advance of questioning to consult with counsel and decide to what extent, if at all, he will respond to questioning. In addition, he can refuse compliance and subsequently contest the legality of

the subpoena in a hearing to show cause. *See United States v. Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328 (1940). And, after he has appeared, he is free to resume his daily activities. *See United States v. Calandra*, 414 U.S. 338, 343 (1974).

Similarly, respondent, after receiving his probation officer's letter requesting him to meet with her, had the opportunity to seek the advice of counsel, to decide whether or not to respond to questioning, and to contest the legality of his probation officer's request if he was subsequently subjected to revocation proceedings for his failure to comply. And, at the conclusion of the interview, he was free to leave and to resume his daily activities. Respondent, therefore, was no more placed in "custody" or coerced by his probation officer's request that he meet with her than is the recipient of a grand jury subpoena.

Finally, the imposition of a warnings requirement in the probationary setting fails to recognize the difference in function between probation and custodial police interrogation. The essence of probation is the suspension of the imposition or the execution of sentence on the condition that the probationer abide by certain rules or "conditions" during the term of the sentence.[4] A. Smith & L. Berlin, *Introduction to Probation and Parole* 3 (2d Ed. 1979). The assumption underlying probation is that a period of guidance and supervision is useful to help probationers avoid further criminal activity and reintegrate into society as constructive

[4]Typically, a probationer is subject to two types of conditions: those which proscribe conduct prohibited to the ordinary citizen, such as the commission of a substantive criminal offense, and those which regulate conduct in areas in which the ordinary citizen is free to act. The latter are called technical conditions and typically include the duty to report to the probation officer as directed and the duty to be truthful with her in all matters. *See* Note, *Parole: A Critique of its Legal Foundations*, 38 N.Y. U.L. Rev. 702, 720 (1963).

individuals. *See Morrisey v. Brewer*, 408 U.S. 471, 477 (1972). The success of probation depends, in large measure, on the probation officer's ability to secure personal information from the probationer and to compel his appearance at regularly scheduled meetings. *See* Newman, *Concepts of Treatment in Probation and Parole Supervision*, 25 Fed. Prob. 11 (March 1961); Note, *Observations on the Administration of Parole*, 79 Yale L. J. 698, 699-700 (1970). The Minnesota Supreme Court's warnings requirement seriously undermines the ability of the probation officer effectively to supervise the probationer and renders her role in the criminal justice system all but meaningless. Moreover, the court's warnings requirement contributes nothing to the protection of probationers against compulsion because probationers are already fully protected by the Fifth Amendment guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

In addition, the requirement that Fifth Amendment warnings precede noncustodial questioning has dramatic adverse consequences on questioning by other governmental officials in the pursuit of their statutory duties. Carried to its logical conclusion, the decision of the Minnesota Supreme Court requires suppression of all noncustodial admissions made to any government agent in the absence of Fifth Amendment warnings. This requirement places an intolerable burden on the administration of justice in general and transmutes the policy of the Fifth Amendment against compulsion into a general policy against incriminating admissions.

C. QUESTIONING BY A PROBATION OFFICER IS NO MORE COERCIVE WHEN THE PROBATION OFFICER HAS REASON TO BELIEVE THAT THE PROBATIONER'S ANSWERS TO HER QUESTIONS ARE LIKELY TO RESULT IN INCRIMINATING ADMISSIONS THAN IT IS OTHERWISE

The holding of the Minnesota Supreme Court is premised, at least in part, on the proposition that the probation officer's belief that respondent's answers to her questions were likely to be self-incriminating rendered his admissions "compelled" within the meaning of the Fifth Amendment. The proposition on which the court's holding is premised ignores the fact that "since at least 1807 . . . all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion," *Hoffa v. United States*, 385 U.S. 293, 303-304 (1966), and that whether a person has been compelled within the meaning of the Fifth Amendment has nothing to do with "the strength or content of the government's suspicions at the time the questioning was conducted." *United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970) (quoted in *Beckwith v. United States*, 425 U.S. 341, 346 (1976)).

Petitioner submits that a probationer's incriminating admissions are not more likely to be compelled merely because the probation officer has reason to believe that the probationer's responses to her questions are likely to be incriminating. No authority supports the proposition that the probation officer's suspicions or her intentions with respect to the probationer have any constitutionally significant bearing on the question whether the probationer was compelled to incriminate himself within the meaning of the Fifth Amendment. Indeed, the holding of the Court in

Beckwith v. United States, supra, established unequivocally that whether a person has been compelled within the meaning of the Fifth Amendment has nothing to do with "the strength or content of the government's suspicions at the time the questioning was conducted." *United States v. Caiello, supra* (quoted in *Beckwith v. United States, supra,* 425 U.S. at 346). *See also Oregon v. Mathiason, supra; Orozco v. Texas, supra; Mathis v. United States, supra.*

Even in the *Miranda* context of custodial interrogation the suspicions of law enforcement officials are irrelevant in defining the right to warnings. There, the presumption of inherent coerciveness applies regardless of whether, at the time of questioning, the police have any basis for suspecting the person being questioned of a crime or any intent to prefer charges against him. As Judge Friendly noted in *United States v. Hall, supra,* 421 F.2d at 544, "a standard [for determining 'custody'] hinging on the inner intentions of the police would fail to recognize *Miranda's* concern with the coercive effect of the 'atmosphere' from the point of view of the person being questioned * * * Clearly the Court [in *Miranda*] meant that *something* more than official interrogation must be shown. It is hard to suppose that suspicion alone was thought to constitute that something; almost all official interrogations of persons who later become criminal defendants stems from that very source." (Emphasis in original.) *See also Lowe v. United States,* 407 F.2d 1391 (9th Cir. 1969); *United States v. Squeri,* 398 F.2d 785, 790 n.1 (2d Cir. 1968).

To be sure, a probationer suspected of involvement in criminal activity faces a greater likelihood that he will be asked questions calling for responses that may be incriminating. But that fact alone, unaccompanied by any action or

procedure that treats him differently from other probationers who are not suspected of a crime, does not render the interrogation coercive or the probationer's incriminating statements compelled in violation of the Fifth Amendment. A probationer suspected of involvement in criminal activity may, like any other probationer, claim the Fifth Amendment privilege as an alternative to self-incrimination. He is certainly no more likely to be ignorant of his Fifth Amendment privilege than any other probationer who, like "virtually every schoolboy[,] is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . . .'" *Michigan v. Tucker, supra,* 417 U.S. at 439.

Similarly, the mere fact that respondent might have not cooperated with his probation officer had he known that her suspicions were focused upon him fails to establish as a matter of law that respondent was coerced into making incriminating admissions in violation of the Fifth Amendment. The probation officer's conduct in this case was anything but coercive. She acted entirely within the scope of her duty to supervise and rehabilitate respondent, in an effort to establish the behavioral relationship between the sex crime for which respondent was placed on probation and the rape and murder to which he confessed during treatment. Her questions were aimed at determining the need for further treatment and not at eliciting incriminating responses from respondent. It was therefore entirely proper for her to question respondent about the 1974 rape and murder in the manner in which she did. Respondent, of course, was free to interpose his Fifth Amendment privilege against self-incrimination at every stage of the interview.

The Minnesota Supreme Court appears to have relied on *Roberts v. United States*, 445 U.S. 552, 559 (1980),[5] for the proposition that Fifth Amendment warnings are required whenever a probation officer is on notice that the questions she plans to ask are likely to result, if answered, in incriminating admissions.[6] The court's reliance on *Roberts* was misplaced. First, the Minnesota Supreme Court misconstrued *Roberts* by turning a qualifying clause into the statement of an affirmative duty, thereby formulating a rule of law never before enunciated by this Court. *Roberts* notwithstanding, however, the clear holding in *Beckwith v. United States, supra*, and *Oregon v. Mathiason, supra*, established beyond peradventure that whether adherence to the warnings requirement of *Miranda* is constitutionally required is determined by the custodial nature of the surroundings and not by the "focus" of the government's investigation or the strength of the government's suspicions at the time of questioning.

The view expressed by Mr. Justice Brennan in his concurring opinions in *Roberts v. United States, supra*, 445 U.S. at 559, and *United States v. Mandujano, supra*, 425 U.S. at 584 —that a knowing and intelligent waiver of the privilege against self-incrimination is required whenever the government is on notice that the questions it plans to ask are likely to result in incriminating admissions— appears to be based upon the notion that a knowing and intelligent waiver (and, therefore, a warning) is necessary prin-

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[5]Mr. Justice Powell, speaking for the majority in *Roberts*, stated that "[a]t least where the government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege [against compelled self-incrimination] may not be relied upon unless it is invoked in a timely fashion." 445 U.S. at 559.

[6]There is also some support for this view in *dicta* in *Garner v. United States, supra*, 424 U.S. at 655.

cipally "to enforce the guarantee of an adversary system" of which "the Fifth Amendment is the essential mainstay." *United States v. Mandujano, supra,* 425 U.S. at 588. This justification for imposing a warnings requirement in a non-custodial setting, however, disregards the fact that the relevant inquiry under the Self-Incrimination Clause is whether there is "genuine compulsion of testimony," *Michigan v. Tucker, supra,* 417 U.S. at 440. The adversary system is not imperiled, and the Fifth Amendment is not violated, unless the government "by *coercion* prove[s] its charge against an accused out of his own mouth." *Rogers v. Richmond,* 365 U.S. 534, 541 (1961) (emphasis added). "The [Fifth Amendment] does not prohibit every element which influences a criminal suspect to make incriminating admissions . . . The constitutional guarantee is only that [a person] be not *compelled* to give self-incriminating testimony. [And] [t]he test is whether, considering the totality of the circumstances, the free will of [that person] was overborne." *United States v. Washington,* 431 U.S. 181, 187-88 (1977) (emphasis in original, citations omitted). In the absence of an officially coerced self-accusation, therefore, an incident that eases the prosecution's burden under our adversary system does not make the system unconstitutionally inquisitorial in violation of the Fifth Amendment.

Miranda clearly established that the heart of the matter is compulsion. That case presents the only circumstance in which this Court has ever held that a knowing and intelligent waiver of the privilege against self-incrimination is a prerequisite to the initiation of questioning by law enforcement officials. As discussed above, the Court's holding in *Miranda* was predicated on the conclusion that compulsion is "inherent in custodial surroundings." 384 U.S. at

458. That conclusion, in turn, "was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of . . . in-custody interrogation,' " *Beckwith v. United States, supra,* 425 U.S. at 346. Thus, because a probation officer's interview of a probationer who is not in custody is not inherently coercive there is no need to impose on the probationary setting a warnings requirement appropriate to custodial interrogations or to other similarly inherently coercive situations.

This does not mean that probationers will be left unprotected from any coercive practices that may be discovered in particular cases. A probation officer's noncustodial interview of a probationer, like any other noncustodial interrogation, "might possibly in some situations, by virtue of some special circumstances, be characterized as one where 'the behavior of . . . law enforcement officials was such as to overbear [a probationer's] will to resist and bring about confessions not freely self-determined . . . .' *Rogers v. Richmond,* 365 U.S. 534, 544 (1961)." *Beckwith v. United States, supra,* 425 U.S. at 347-48. In such cases, it will be the duty of a reviewing court, including this Court, to examine the entire record and make an independent determination of whether the questioning was in fact unconstitutionally coercive. *Id.* The presence or absence of Fifth Amendment warnings in such cases, however, while relevant evidence going to the ultimate issue, would not by itself be determinative of whether a probationer's incriminating admissions were coerced in violation of the Fifth Amendment. *Id.; Schneckloth v. Bustamonte,* 412 U.S. 218, 227 (1973).

II.

A PROBATIONER WHO MAKES NONCUSTODIAL INCRIMINATING ADMISSIONS TO HIS PROBATION OFFICER INSTEAD OF CLAIMING HIS FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION MAY NOT SUBSEQUENTLY INVOKE THE PRIVILEGE AS A BAR TO THE USE OF HIS INCRIMINATING ADMISSIONS IN A SUBSEQUENT CRIMINAL PROSECUTION.

A. THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION IS NOT SELF-EXECUTING: IT MUST BE CLAIMED OR IT IS WAIVED.

It is now well established that when an individual who is called to testify (by subpoena, for example) makes incriminating disclosures instead of claiming his Fifth Amendment privilege, the government has not "compelled" him to incriminate himself and his testimony may be used against him in a subsequent criminal prosecution. This rule applies to testimony given in a civil proceeding, *United States v. Kordel*, 397 U.S. 1 (1970), before a grand jury, *see United States v. Monia*, 317 U.S. 424, 427 (1943), or in response to an administrative summons, *see United States v. Murdock*, 284 U.S. 141, 148 (1931). It also applies to incriminating disclosures made by a taxpayer on his tax returns. *Garner v. United States, supra*, 424 U.S. at 656-57.

Some of the earlier decisions articulating and applying this rule explain it as being grounded in a theory of implied waiver. *See, e.g., United States v. Murdock, supra*, 284 U.S. at 148. Later decisions have correctly pointed out, however, that this rule "reflect[s] an appropriate ac-

commodation between the Fifth Amendment privilege and the . . . principle that governments have the right to everyone's testimony." *Garner v. United States, supra,* 424 U.S. at 655. The Fifth Amendment speaks of compulsion. "It does not preclude a witness from testifying voluntarily in matters which may incriminate him." *United States v. Monia, supra,* 317 U.S. at 427. Nor does it "forbid the asking of criminative questions." *Id.* at 433. Therefore, if a witness desires the protection of the privilege he must claim it or his testimony will not be deemed to have been compelled within the meaning of the Fifth Amendment. *Id.* at 424.

The requirement of express assertion of the privilege pertains even though a witness in a civil proceeding or before a grand jury is ordinarily subject to some compulsion to testify: he often will have been summoned by legal process to appear and to give testimony; he takes an oath that he will tell the truth; and the judge may inform him, if necessary, that he has a duty as a citizen to provide evidence and may not refuse to do so on mere whim. But the mild coercion to which any witness is thereby subjected does not, under decisions of this Court, constitute a basis for subsequent "retroactive" invocation of the Fifth Amendment privilege.

Accordingly, more recent cases involving the question whether a particular witness's testimony may be used against him in a subsequent criminal proceeding have focused upon whether the witness, when testifying, was subjected to a more compelling form of testimonial coercion than that to which a witness is ordinarily subject. Where such coercion has been found, the Court has concluded that the testimony thus compelled, even though given without a contempor-

aneous claim of privilege, is immune from subsequent prosecutorial use against the witness. *See Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967). In the absence of some special or unusual compulsion to speak, however, the prosecution's right to use a witness's previous statement has been recognized. *See Garner v. United States, supra; United States v. Kordel, supra.*

"[T]he general rule that the privilege must be claimed" is subject to generic exception only in those "narrowly defined situations" characterized by some factor that has been "held to deny the individual a 'free choice to admit, to deny, or to refuse to answer.' " *Garner v. United States, supra*, 424 U.S. at 655-57 (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)). One such situation involves persons in police custody who make statements during incommunicado interrogation without advise and waiver of rights. *Miranda v. Arizona, supra.* In carving an exception to the general rule that the privilege against self-incrimination must be claimed and in adopting the "extraordinary safeguard of excluding statements made without a knowing and intelligent waiver of the privilege," the *Miranda* Court was "impelled" by the presumption that "without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent." *See Garner v. United States, supra*, 424 U.S. at 657. Nothing in this case, however, suggests the need for a similar presumption. As we have already indicated, a probation officer's noncustodial interview of a probationer differs markedly from incommunicado police interrogation in its potential for overbearing the will of the probationer. Custodial interrogation entails risks of coercion such as the

use of "third degree" tactics or "deceptive stratagems" designed to "persuade, trick, or cajole [a suspect] out of exercising his constitutional rights," *Miranda v. Arizona, supra,* 384 U.S. at 455. Since these risks are nonexistent in the probationary setting, it hardly seems appropriate to depart in this case from the long-standing rule that a witness must claim the privilege against self-incrimination or lose its protection.

The second "narrowly defined situation" in which use immunity may attach to disclosures made without a contemporaneous claim of privilege involves individuals who, when called to testify in proceedings inquiring into suspected illegalities, are subjected to the imposition of an official penalty or sanction designed to coerce them to forego a valid claim of privilege. *See Lefkowitz v. Cunningham,* 431 U.S. 801 (1977); *Baxter v. Palmigiano,* 425 U.S. 308 (1976); *Lefkowitz v. Turley, supra; Gardner v. Broderick,* 392 U.S. 273 (1968); *Garrity v. New Jersey, supra; Spevack v. Klein, supra.* In all these cases, the individuals called for questioning were directly and explicitly threatened with substantial punitive action for a concededly valid invocation of their Fifth Amendment privilege or for refusal to waive immunity from prosecutorial use of their testimony. These individuals were thus given a choice between self-incrimination and exposure to penalties which made assertion of the Fifth Amendment privilege "costly." *Spevack v. Klein, supra,* 385 U.S. at 515. The Court held this choice to be inherently coercive noting that, like the interrogation practices in *Miranda,* it was "likely to exert such pressures upon an individual as to disable him from making a free and rational choice." *Garrity v. New Jersey, supra,* 385 U.S. at 497.

Nothing remotely similar confronts a probationer during the course of questioning by his probation officer. As the facts of this case demonstrate, a probationer is faced with no threat, express or implied, of a penalty for asserting his Fifth Amendment privilege. Nor is he subjected to other undue pressures designed to coerce him to forego a valid claim of privilege. Indeed, a probationer is subject to no greater compulsion during the course of a noncustodial interview with his probation officer than that experienced by a grand jury witness. Moreover, he could not constitutionally be punished for validly asserting his Fifth Amendment rights. *See Spevack v. Klein, supra,* 385 U.S. at 515-16; *Malloy v. Hogan,* 378 U.S. 1, 8 (1964). Thus, a valid claim of privilege would be available to a probationer as a complete defense to probation revocation. Under *Garner,* this is sufficient to preserve the probationer's freedom "to admit, to deny, or to refuse to answer." *Garner v. United States, supra,* 424 U.S. at 657.

When a witness called to testify before a grand jury claims his Fifth Amendment privilege as a basis for refusing to answer, the grand jury may proceed in one of two ways: it may either pursue other avenues of inquiry or seek a judicial determination as to the validity of the witness's claim, in which case the witness would have to satisfy the presiding judge that his claim of privilege is valid. If in fact there is reason to apprehend danger to the witness from his being compelled to testify, the witness will be excused from testifying unless the prosecution determines that the information sought is of such overriding importance as to justify a grant of immunity under the circumstances. If, on the other hand, there is no reason to apprehend danger to the witness from his being compelled to

testify and the judge orders him to answer, the witness must answer or risk contempt. *See United States v. Mandujano, supra,* 425 U.S. at 575.

Similarly, a probationer who invokes his Fifth Amendment privilege as a reason for refusing to answer questions by his probation officer calling for incriminating responses would be constitutionally entitled, prior to the imposition of any punishment, to a preliminary hearing. *See Morrisey v. Brewer, supra,* 408 U.S. at 485. At this hearing, the presiding judge would be called upon to determine "whether there is probable cause or reasonable ground to believe that the [probationer] has committed acts that would constitute a violation of [probation] conditions." *Id.* This determination would necessarily involve an assessment of the validity of the probationer's claim of privilege.

If the judge upholds the probationer's claim, the probationer would be in the same protected situation as a grand jury witness who is excused from testifying on grounds of privilege. If the judge denies the probationer's claim of privilege, thereby finding that there is probable cause to believe that he has violated the conditions of his probation, the probationer would be constitutionally entitled to a revocation hearing. *See Morrisey v. Brewer, supra,* 408 U.S. at 487-88. At the revocation hearing, he would have an opportunity to be heard and to establish, by asserting his invocation of the privilege as a defense, that he did not violate the conditions of his probation. *Id.* Thus, upon denial of a claim of privilege, the probationer would be in the same situation as a grand jury witness whose claim of privilege is denied, namely, having to choose between making the requested disclosures and asserting his claim of privilege as a defense at a probation revocation hearing. It

is therefore evident that the mechanics that would be brought into play upon a probationer's assertion of a claim of privilege closely resemble those that operate in the context of grand jury proceedings and are not improperly coercive.

Most importantly, a valid assertion of a claim of privilege is available to probationers as a complete defense to probation revocation. It is clear under the relevant decisions of this Court that a probationer may not constitutionally be punished for asserting his Fifth Amendment privilege against self-incrimination in lieu of answering questions by his probation officer which, if answered truthfully, would result in incriminating admissions. "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement [,][namely,] the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan, supra,* 378 U.S. at 8. A "penalty" in this context is not merely a fine or imprisonment but "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' " *Spevak v. Klein, supra,* 385 U.S. at 515.

This Court has indicated that it "find[s] no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others . . . and [that it] . . . can imply no exception." *Spevack v. Klein, supra,* 385 U.S. at 516. Accordingly, probationers, like the policemen in *Garrity* and the lawyer in *Spevack,* are constitutionally entitled to assert their Fifth Amendment privilege without suffering any punitive action that would make assertion of the privilege "costly." As a result, pro-

bation could not constitutionally be revoked on the basis of a valid and timely claim of privilege.[7]

Since respondent could not be punished for asserting his Fifth Amendment privilege in lieu of incriminating himself, he could prevail in this case only if the possibility that his claim of privilege could be tested at a revocation hearing suffices in itself to deny him the freedom to invoke the privilege. Arguably, a probationer contemplating a claim of privilege during the course of a noncustodial interview with his probation officer faces a more difficult choice than does a witness contemplating a claim of privilege in a judicial proceeding. The latter receives a ruling on the validity of his claim of privilege at the time he makes the claim and has an opportunity to reconsider before being held in contempt. The holding of the Court in *Garner v. United States*,

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[7]Moreover, under Minnesota law probation may be revoked only "[w]hen it appears that the [probationer] has violated any of the conditions of his probation or has otherwise been guilty of misconduct which warrants the imposi[tion] or execution of sentence . . . ." Minn. Stat. § 609.14, subd. 1 (1980). "If none of such grounds [is] found to exist, the [probationer] shall be restored to his liberty under the previous order of the court." Minn. Stat. § 609.14, subd. 4 (1980).

Respondent was not required to relinquish his Fifth Amendment rights as a condition of his probation. He was merely required to report to his probation officer as directed, to be truthful with her in all matters, to keep her informed of his place of residence and employment at all times, to obey the law, to pursue treatment for sexual offenders, to remain within the State of Minnesota during the term of probation, and to incur no financial indebtedness (App. C-34-35). Thus, a valid assertion of his Fifth Amendment privilege would not have constituted a violation of the conditions of probation and would not therefore have been a ground for revocation under Minn. Stat. § 609.14, subd. 1 (1980).

A valid claim of privilege is, by definition, a truthful response to a question which would otherwise elicit an incriminating response. As such, it would have been consistent with the requirement that respondent be truthful with his probation officer. Thus, had respondent invoked his Fifth Amendment privilege in lieu of making incriminating admisisons to his probation officer, his claim of privilege would have been available to him under Minn. Stat. § 609.14, subd. 1 (1980) as a complete defense to probation revocation.

supra, however, established unequivocally that "[a]s long as a valid and timely claim of privilege is available to a [person] prosecuted for [an alleged violation], [that person] has not been denied a free choice to remain silent merely because of the absence of a judicial ruling on his claim." 424 U.S. at 665. Thus, under *Garner*, the possibility that respondent's claim could be tested at a revocation hearing did not "compel" his incriminating admissions or deny him a "free choice to admit, to deny, or to refuse to answer." *Garner v. United States, supra*, 424 U.S. at 657. Rather, the protection accorded a valid claim of privilege in the context of a probation revocation hearing was sufficient as a mattter of law to preserve respondent's freedom to choose between making incriminating admissions and claiming his Fifth Amendment privilege against self-incrimination. *Id.*

Accordingly, a probationer is not subject to impermissible testimonial compulsion during the course of a noncustodial interview with his probation officer. In the absence of a valid and timely assertion of a claim of privilege, therefore, there is no constitutional basis for barring prosecutorial use of a probationer's incriminating admissions to his probation officer or for departing in the probationary setting from the long-standing rule that a person must claim his privilege against self-incrimination or lose its protection.

To be sure, the probationary status may exert some pressures on probationers generally and may engender an atmosphere conducive to truth telling. These pressures, however, are a far cry from the coercive pressures perceived by this Court in *Miranda* to be inherent in incommunicado custodial interrogation and to deprive criminal suspects of the freedom to invoke their constitutional right to remain

silent. They are also critically different from the inherently coercive choice between self-incrimination and substantial punitive action decried by this Court in *Garrity* and *Spevack*, in that a probationer has at all times the right to refuse to answer questions encroaching on areas of potential self-incrimination. Accordingly, absent a valid and timely claim of privilege or some indicia of involuntariness, a probationer's noncustodial incriminating admissions to his probation officer are not barred by the Fifth Amendment and may properly be used against him in a subsequent criminal prosecution.

III.

DUE PROCESS REQUIRES NEITHER THE ROUTINE ADMINISTRATION OF FIFTH AMENDMENT WARNINGS PRIOR TO A PROBATION OFFICER'S NONCUSTODIAL INTERVIEW OF A PROBATIONER NOR SUPPRESSION OF RESPONDENT'S INCRIMINATING ADMISSIONS TO HIS PROBATION OFFICER

Although the Minnesota Supreme Court did not expressly articulate the basis upon which its holding rests, it appears that its decision is rooted to some degree in the notion that it is somehow unfair to require a probationer to meet with his probation officer as directed and to be truthful with her when the probation officer has reason to believe that the probationer's answers to her questions, if truthful, could prove incriminating. The only available "fairness" rationale for a warnings requirement in the circumstances of this case is that warnings might have an impact on the probationer's evaluation of whether to cooperate with his probation officer or invoke his privilege against self-incrimination. This decision-making process,

however, is afforded all the constitutional protection to which it is entitled by the Self-Incrimination Clause. Thus, the Due Process Clause provides no independent constitutional basis for requiring Fifth Amendment warnings in the circumstances of this case and contributes nothing to the resolution of the question whether such warnings are required.

Assuming, however, that there are other policies implicated by the Due Process Clause, independent of the constitutional policy against compulsion, that might bear on a probationer's entitlement to Fifth Amendment warnings, we submit that there is nothing unfair in the failure to administer warnings appropriate to custodial interrogation in a noncustodial setting and that, therefore, there is no basis for holding them to be required by due process considerations. Indeed, this Court has never ruled that "the Due Process Clause require[s] the prosecution to prove as part of its initial burden that the [individual being questioned] knew he had a right to refuse to answer . . . ." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 226-27.

The critical inquiry under the Due Process Clause is whether "the behavior of law enforcement officials was such as to overbear [an individual's] will to resist and bring about confessions not freely self-determined." *Rogers v. Richmond, supra,* 364 U.S. at 544. In determining whether an individual's will to resist was overborne in a particular case the Court has traditionally "assessed the totality of all the circumstances [including] both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 226.

Some of the factors the Court has consistently relied upon in finding a confession involuntary include the youth of the

accused, *see, e.g., Haley v. Ohio,* 332 U.S. 596 (1948); his lack of education, *see, e.g., Payne v. Arkansas,* 356 U.S. 560 (1958); and his low intelligence, *see, e.g., Fikes v. Alabama,* 352 U.S. 191 (1957). The Court has also considered the length of detention, *see, e.g., Chambers v. Florida,* 309 U.S. 297 (1940); the use of overt physical force, *see, e.g., Brown v. Mississippi,* 297 U.S. 278 (1936); the use of deceptive promises and practices, *see, e.g., Spano v. New York,* 360 U.S. 315 (1959); the use of prolonged isolation from family and friends, *see, e.g., Gallegos v. Colorado,* 370 U.S. 49 (1962); the use of threats to have petitioner's children taken away from her, *see, e.g., Lynumn v. State of Illinois,* 372 U.S. 528 (1963); and the repeated and prolonged nature of the questioning, *see, e.g., Ashcraft v. Tennessee,* 322 U.S. 143 (1944).

In seeking to rest its decision on due process grounds, the Minnesota Supreme Court entirely overlooked the criteria this Court has traditionally relied upon in finding confessions involuntary and relied instead on the probation officer's failure to advise respondent of his Fifth Amendment rights and her intention to reveal to the police any information she might obtain from respondent regarding the 1974 rape and murder. These factors do not even approximate those that this Court has held to violate due process requirements. Although rights to advise a criminal suspect of his constitutional rights is a relevant criterion in determining the voluntariness of a confession, *see, e.g., Davis v. North Carolina,* 384 U.S. 737 (1966), it is not in and of itself determinative, *see Schneckloth v. Bustamonte, supra,* 412 U.S. at 227. This Court has clearly stated that a determination of voluntariness turns on a careful scrutiny of all the circumstances surrounding a

confession, and not on the presence or absence of a single criterion such as the giving of warnings. *See Schneckloth v. Bustamonte, supra,* 412 U.S. at 227. Similarly, the probation officer's intentions with respect to the probationer, alone or in conjunction with her failure to administer warnings, cannot possibly be said to have deprived respondent of that "fundamental fairness essential to the very concept of justice," *Payne v. Arkansas, supra,* 356 U.S. at 567 (quoting *Lisenba v. California, supra,* 314 U.S. at 236), and to have rendered his confession involuntary.

Measured against the standard enunciated by this Court in *Rogers v. Richmond, supra,* the facts of the present case do not show anything approaching a due process violation. Indeed, an examination of the circumstances surrounding respondent's interview with his probation officer reveals that the probation officer acted in a fair and dispassionate manner and that respondent's confession was the product of his free and rational choice.

Respondent, a convicted felon, is a twenty-nine-year-old high school graduate (App. C-25, C-29) who attended vocational school and later served in the military (App. C-29). As his testimony at the pretrial hearing reflects (App. C-25-30), he is articulate, intelligent, and was fully familiar with the criminal justice system at the time of his incriminating admissions (App. C-29).

Respondent was interviewed by his probation officer in surroundings that had been familiar to him for at least one year (App. C-29). He was subjected to no menacing interrogation procedures, overbearing tactics of psychological persuasion, physical coercion, lengthy incommunicado detention, threats, or promises. Indeed, the interview was conducted with a high degree of restraint and civility. More-

over, respondent was neither under formal arrest nor deprived of his freedom of action in any way (App. C-19-20). Thus, the pressures on respondent to incriminate himself, if any, are hardly comparable even with the least prejudicial of the pressures this Court has traditionally recognized as rendering confessions involuntary.

None of the foregoing factual assertions was controverted by respondent at the pretrial hearing and respondent offered no evidence as much as tending to show that the probation officer's conduct in this case, designed primarily to determine the need for further treatment, subjected him to any "hardship" within the meaning of the Due Process Clause.

Moreover, the record is devoid of any evidence that in obtaining respondent's confession the probation officer deceived him or in any way participated in an unlawful practice which deprived respondent of his fundamental rights. Respondent was told at the outset of the interview that his counselor had implicated him in the 1974 rape and murder of a seventeen-year-old woman and that his probation officer wished to talk to him about that crime in order to evaluate the need for further treatment (App. C-11, 26). Although respondent was not advised until the conclusion of the interview that his probation officer had a duty to relay to the police any information she might obtain from him regarding the rape and murder, respondent indicated that he was aware of that duty (App. C-22).

Under these circumstances, the probation officer's failure to advise respondent of his Fifth Amendment rights can hardly be said to violate "fundamental fairness" or to be "shocking to the universal sense of justice[,]" *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960),

simply because it incidentally presented respondent with a choice between two entirely legitimate alternatives—asserting his privilege against self-incrimination or truthfully recounting his involvement in the 1974 rape and murder in issue. That respondent chose to adopt the latter alternative cannot be attribued to any action that the probation officer took or did not take. Rather, respondent's choice was the product of his own free will.

Finally, suppression of respondent's incriminating admissions to his probation officer would serve no "valid and useful purpose." *Michigan v. Tucker, supra,* 417 U.S. at 446. Accordingly, the drastic remedy of exclusion is inappropriate in this case. The purpose of the exclusionary rule in Fifth Amendment cases is to deter future unlawful conduct by government officials and to protect the courts from reliance on untrustworthy evidence. *Id.* at 446-48. This Court has indicated that "[t]he deterrent purpose of the exclusionary rule necessarily assumes . . . willful, or at the very least negligent, conduct which has deprived [an individual] of some right[,]" and that it "looses much of its force" where the official action "was pursued in complete good faith." *Id.* at 447. Here, the probation officer acted in complete good faith throughout the entire course of her interview with respondent and her conduct deprived respondent of no constitutional rights. The deterrent purpose of the exclusionary rule, therefore, would not be furthered by suppressing respondent's incriminating admissions. Unlike the Fourth Amendment exclusionary rule, which is deemed necessary because there is considered to be no other practical means of correcting and forestalling police behavior in violation of Fourth Amendment rights, an exclusionary principle in this context would be ad-

dressed to the regulation of the conduct of court-appointed officials. There is no reason to suppose that there would be any significant incidence of disobedience by such officials to a requirement to administer warnings to probationers.

In addition, suppression of respondent's admissions would not further the trustworthiness purpose of the exclusionary rule because even the Minnesota Supreme Court recognized that respondent's incriminating admissions were "trustworthy evidence" (App. A-11). Accordingly, the drastic remedy of exclusion is unwarranted in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the judgment of the Minnesota Supreme Court should be reversed.

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